No. 14,266

In the

United States Court of Appeals

For the Ninth Circuit

BERNARD BLOCH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Opening Brief

Appeal from the United States District Court
For the District of Arizona

WADE CHURCH
324-327 Mayer-Heard Building
Phoenix, Arizona
Attorney for Appellant

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

TABLE OF AUTHORITIES CITED

No. 14,266

In the

United States Court of Appeals

For the Ninth Circuit

BERNARD BLOCH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Opening Brief

Appeal from the United States District Court
For the District of Arizona

JURISDICTIONAL MATTERS

On November 9, 1953 in the United States District Court for the District of Arizona, Honorable David Ling, presiding, the appellant, Bernard Bloch, was found guilty of the offense of violating Title 26, United States Code, Section 145 (b) (Income Tax Evasion), as charged in Count II of the Indictment, and at the same time was found Not Guilty on Count I of the said Indictment (T.R. 3-4). November 9, 1953 the Appellant filed a motion for a new trial (T.R. 19), which motion was denied by the Court on December 7, 1953 (T.R. 20) and on December 14th, 1954 the Court entered its judgment and commitment (T.R. 21). On December 15, 1954 the Appellant, Bernard Bloch, filed a Notice of Appeal (T.R. 22).

The District Court had jurisdiction under Title 26, United States Code, Section 145 (b) (Income Tax Evasion). This Court has jurisdiction under 28 U.S.C. Section 1291.

STATEMENT OF THE CASE

On May 28, 1953 a grand jury returned an indictment charging the appellant with violation of Section 145 (b) Internal Revenue Code; 26 U.S.C.A., Section 145 (b) in two Counts: Count I relating to the calendar year of 1947, and Count II to the calendar year 1948.

For the purposes of this appeal the facts may be summarized as follows:

The appellant filed income tax returns (Form 1040) for the calendar years 1947 and 1948. The 1947 return showed a net income for said calendar year of $2,268.81 and the amount of tax paid on said income was $292.00; and the 1948 return indicated a net income for that calendar year of $2,745.90 on which a tax of $309.00 was paid. The evidence indicated that there was professional income received during 1947 and 1948 that was not reported by the appellant.

The appellant started his professional practice in 1947. He went to a community on the outskirts of Phoenix called Sunnyslope. He was one of the first physicians to go into that area and pioneered a practice in a community that was seriously in need of medical attention, as the Phoenix doctors did not choose to make the ten-mile trip because of their own over-crowded practices. The appellant was immediately covered up with work and labored day and night to take care of the needs of his patients. He did a great deal of free work for those who could not afford medical care. He was so busy with his practice that he left the care of his records to others.

His 1947 return was compiled by one Daniel J. Mooney, a general office worker by day and an income-tax consultant

of sorts by night. He worked with figures supplied by the appellant. The appellant relied on Nona Jokela for the data on income from professional services. Miss Jokela was in complete charge of the receipts of the appellant from his medical practice and responsible for their accuracy (T.R. 131-132). She set up the original books patterned after those that were used by her former employer in Detroit (T.R. 125). The so-called books consisted of:

1. An appointment book
2. Daily Record Sheet of Receipts
3. Medical History Card

The actual summary of the receipts from the appellant's medical practice was tabulated in 1947 by Nona Jokela. The data with reference to other income and expenditures was furnished by the doctor. The government questioned the amount of professional income received as against that reported, but did not raise any question about the deductions.

The doctor-appellant's income tax return was prepared by a night-time tax consultant for the sum of $5.00 with data furnished by the doctor and Miss Nona Jokela. The appellant simply signed the return after it was prepared and presented to him by Mr. Daniel J. Mooney. The doctor did not consult a lawyer or accountant in formulating his return.

The 1948 return was prepared in a similar fashion, with the exception of the fact that it was actually prepared by Mrs. Helen Zimberg who was working for the doctor taking care of his books, helping him with the patients, cleaning the office, cooking his meals, ironing his clothes and taking care of his skating rink which kept her busy from "morning to night!" (T.R. 229). The compiling of the figures and the actual making up of the appellant's 1948 return was left to

this young lady who had never had any experience with account books and didn't know the nature of a journal, a ledger, a cashbook, a profit and loss statement or a balance sheet (T.R. 241-242). Mrs. Zimberg prepared the 1948 return and the busy doctor signed it. The doctor did not consult a lawyer or an accountant in preparing his return.

The case was submitted to the jury and the appellant was found "Not Guilty" on Count I, and "Guilty" on Count II with the jury recommending leniency.

Other facts appear in the argument.

THE QUESTIONS INVOLVED

The questions involved on this appeal are: (1) Did the Court err in failing to give defendant's instruction No. 2? (2) Did the Court err in failing to instruct properly the jury with reference to irrelevant questions asked by the prosecution (See Table A)? (3) Did the jury bring in conflicting verdicts on what were substantially the same fact situations in Counts I and II of the indictment?

SPECIFICATION OF ERROR NO. I

The Court erred in failing to give the following instruction No. 2 which was requested by the defense (T.R. 18-19):

Defendant's Instruction No. 2

> "The indictment in this case charges a violation of a willful attempt to evade or defeat a tax imposed by Section 145 (b) of Title 26, United States Code. I instruct you that willfully 'means knowingly, and with a bad heart, and a bad intent; it means having the purpose to cheat or defraud or do a wrong in connection with a tax matter. It is not enough if all that is shown is that the defendant was stubborn or stupid, careless, negligent or grossly negligent. A defendant is not willfully evading a tax if he is careless about keeping his

books. He is not willfully evading a tax if all that is shown is that he made errors of law. He is not willfully evading a tax if all that is shown is that he in good faith acted contrary to regulations laid down by the Bureau of Internal Revenue and the United States Department of Treasury. He certainly is not willful if he acts without advice of a lawyer or accountant.' "

Guant v. U. S., 184 F.2d 284.

Certiorari denied by Supreme Court.
Refused:

/s/ Dave W. Ling, Judge.

SPECIFICATION OF ERROR NO. II

The Court erred in failing to instruct the jury properly with reference to certain questions that were asked by the prosecution. For the convenience of the Court these questions have been tabulated and set out in Table A (infra).

SPECIFICATION OF ERROR NO. III

The jury brought in conflicting verdicts based on what were substantially the same fact situations in Counts I and II of the indictment.

ARGUMENT IN SUPPORT OF SPECIFICATION OF ERROR NO. I

The Court erred in refusing to give Defendant's Instruction No. 2. While a general definition of "willfully" was given by the Court in its instructions to the jury, it is submitted that the Court should have been more specific in giving a guide to the jurors in light of a decision in a similar case on "all-fours" with the factual situation in the instant case. In *Guant v. United States of America*, 184 Fed. 2d 284 (Certiorari denied by Supreme Court of the United States, January 8, 1951, 340 U.S. 939) the Court speaking through

Questioner	Questioned	Subject: Question	Question
Murless	Appellant	Sexual Intercourse	Did you ever under oath swea never had sexual intercourse wit Irene Crocker? (T.R. 383)
Murless	Appellant	Sexual Intercourse	Did you testify at that time tha never had sexual intercourse w girl, a juvenile, by the name of Ruff? (T.R. 383)
Murless	Appellant	Doctor's License	Have you ever been refused a l (doctor's) anywhere else (T.R. 3
Murless	Appellant	Illegal Operations	Did you make an oath that you performed illegal operations in office? (T.R. 382)
Murless	Appellant	Illegal Operations	Did you make an oath that you failed to report fees from illegal tions? (T.R. 382) A. I never failed to report fees illegal operations? Q. Yes. A. I never performed illegal tions.
Murless	Appellant	Mistress	Were you keeping Mrs. Jokela d 1947? (T.R. 380)
Thurtle	Jokela (Receptionist)	Mistress	How long have you lived wit doctor? (T.R. 293)
Thurtle	Jokela (Receptionist)	Mistress	Did the doctor give you anythin besides your $100.00 and roon board? A. No Sir. Did he ever give you any dia rings? A. No, he didn't Did he ever give you any expe jewelry? A. No. Did he ever take you on any trips him? A. On occasion, y

ECTIONABLE QUESTIONS

Counsel Objection	Court
r Honor I object.	Yes, what does that have to do with this case?
ject to that. What does that have to ith this case, your Honor?	Disregard that, gentlemen. It is highly improper.
r Honor, I object. That has nothing o with this case. It is absolutely im-erial.	Yes. Disregard that, too, gentlemen. You are going to have mistrial in a minute young man, if you keep that up.
e Honor, I am going to object.	Just a minute. What does that have to do with it?
e	None
ject to that question. The wording is ying that—he says, "Were you keep-Irs. Jokela?"	Yes it isn't necessary.
e Honor, I am objecting to this line stimony. The defendant is presumed ave good character. There is no evi-e that has been introduced of good acter and therefore, any evidence h is evidence of bad character is not issible.	There is not any evidence that she lived with the doctor. You are assuming that.
r Honor, I am going to object to this e of testimony. This is apparently ence, attempted evidence of bad acter.	She wouldn't have to answer that question. She can claim immunity.

Judge Woodbury said that the following charge "seems to us accurate and adequate, and eminently fair to the defendant on the issue of wilfulness":

> "The indictment in this case charges a violation of a willful attempt to evade or defeat a tax imposed by Section 145 (b) of Title 26, United States Code. I instruct you that willfully 'means knowingly, and with a bad heart, and a bad intent; it means having the purpose to cheat or defraud or do a wrong in connection with a tax matter. It is not enough if all that is shown is that the defendant was stubborn or stupid, careless, negligent or grossly negligent. A defendant is not willfully evading a tax if he is careless about keeping his books. He is not willfully evading a tax if all that is shown is that he made errors of law. He is not willfully evading a tax if all that is shown is that he in good faith acted contrary to regulations laid down by the Bureau of Internal Revenue and the United States Department of Treasury. He certainly is not willful if he acts without advice of a lawyer or accountant,' for there is no requirement that a tax payer, no matter how large his income, should engage a lawyer or an accountant."

This case is good law, has been quoted in a number of subsequent cases, and is admirably suited to the facts in the instant case. This case would have served as an intelligent guide to the jury because: (1) it spelled out the meaning of "willful" in a practical manner adapted to the fact in the case; (2) it pointed out the meaning of "willful" in relation to whether the defendant was "stubborn or stupid, negligent or glossly negligent;" (3) it related the meaning of the word to carelessness in keeping books which carelessness was evident in the instant case; (4) then, too, it related the meaning of "willful" to actions of a defendant in not consulting a lawyer or an accountant which had a direct application to the case in hand. In a word, the jury

would have been afforded a practical guide in language they could understand, rather, than a technical definition that afforded them little help in arriving at the meaning of "willful."

ARGUMENT IN SUPPORT OF SPECIFICATION OF ERROR NO. II

The Court in failing to instruct the jury properly with reference to certain questions asked by the prosecution, seriously prejudiced the jury against the appellant. These questions which have been tabulated in Appellant's "Table A" show an overall persistent pattern of questioning designed to inflame and prejudice the jury against the appellant, which questions were wholly irrelevant and incompetent with reference to proof of the issues involved in this case. This case involved a *willful* and *knowing* evasion of income taxes. The fundamental element of the crime was that of willfulness, or its lack. By the greatest stretch of the imagination, the questions of whether the appellant had sexual intercourse with certain persons, whether he was denied a doctor's license in any other state, whether he performed illegal operations, or whether he kept a mistress had no bearing on this central issue of *wilfulness* in evading the payment of income taxes. Yet, the prosecution insisted on getting before the jury these evidences of bad character by putting questions to the appellant and Nona Jokela, his receptionist, which they knew would receive a "no" answer. We have broken down the objectionable questions into four categories: (1) those relating to sexual intercourse; (2) refusal of a doctor's license; (3) illegal operations; and (4) mistress.

First, let us examine the questions with reference to *sexual intercourse:*

Mr. Murless to Appellant

"Q. Did you ever under oath swear you never had sexual intercourse with one Irene Crocker?" (T.R. 383)

Mr. Murless to Appellant

"Q. Did you testify at that time that you never had sexual intercourse with a girl, a juvenile, by the name of Betty Ruff?" (T.R. 383)

These questions, of course, outrage every principle of evidence. They are immaterial and irrelevant to the issues involved and tend to inflame the minds of the jury against the defendant. There is nothing wrong with sexual intercourse *per se;* however, when it is implied that it took place between the defendant (a bachelor) and one Irene Crocker, who might be married or unmarried, then, it would be an illegal act; and when it impliedly took place between the defendant and a *juvenile* named Betty Ruff, then it becomes not only illegal, but a thing abhorred.

The second objectionable question concerned implied refusal of a *doctor's license.* The question was:

Mr. Murless to Appellant

"Q. Have you ever been refused a license (doctor's) anywhere else?" (T.R. 384)

This question was asked by the prosecution with the expectation of a "no" answer, and for the purpose of leading the jury to believe that the doctor had been refused a license elsewhere and had to come to Arizona to practice. There was no evidence of a refusal elsewhere introduced by the prosecution; and further, the question was not relevant to any issues involved.

The third set of questions involved *illegal operations.* While no evidence was ever presented of any illegal operations performed by the appellant, the prosecution in order

to persuade the jury that they were dealing with a "bad guy" asked the following questions:

Murless to Appellant

"Q. Did you make an oath that you never performed illegal operations in your office?" (T.R. 382)

Murless to Appellant

"Q. Did you make an oath that you never failed to report fees from illegal operations?" (T.R. 382)

The defendant answered the latter question before an objection could be interposed.

Here, again, what bearing could unsubstantiated illegal operations have on the issues involved in a criminal income tax case? Here the purpose must have been to raise ugly implications, rather than to carry the burden of proof on the material issues.

Finally, a series of questions were asked by the prosecution to convey to the jury that Miss Nona Jokela was a *mistress* of the appellant. These questions were:

Thurtle to Jokela (Receptionist)

"Q. How long have you lived with the doctor?" (T.R. 293)

Thurtle to Jokela (Receptionist)

"Q. Did the doctor give you anything else besides your $100 and room and board? Did he ever give you any diamond rings? Did he ever give you any expensive jewelry? Did he ever take you on any trips with him? Where did he take you?"

Again, these questions were designed to unduly prejudice the jury against the appellant and had no probative value.

All of the questions listed above and tabulated in Appellant's "Table A" seem to fit into an overall plan on the part of the prosecution to attempt to convict the appellant on the basis of other unproved acts quite apart from those upon

which the income tax case was based. Thus, the prosecution reasoned that they would have two strings to their bow, and that in the event the income tax string snapped, they would still have the "bad-guy" string intact.

It is submitted that these questions can at once be seen to be damaging to the appellant because behind each question is a form of implied warranty by the United States attorney that the facts upon wrich the questions were based were true. It is as though the Federal attorneys had themselves taken the stand and sworn they possessed evidence that the appellant:

1. Had sexual intercourse with Irene Crocker and Betty Ruff;
2. Had been denied a doctor's license elsewhere;
3. Had performed illegal operations; and
4. That the appellant was keeping a mistress.

These are the ideas that the prosecution was trying and succeeded in conveying to the jury, cleverly sneaking in the back door what they could not hope to get in through the front door. If the Federal attorney had facts with which he wished to impeach the appellant, then he could have been sworn like any other witness and been submitted to cross-examination, but it is wrong legally and morally for him to get before the jury knowledge that he may possess under the guise of cross-examination.

See *Hash v. State,* 48 Ariz. 43; 59 Pac. 2d at page 311.

The lower Court judge is to be commended on his valiant effort to keep the objectional insinuations from the jury by sustaining the frequent objections of counsel for the appellant. While he did not always caution the jury to disregard the question, he ruled properly in each case. However, the stubborn fact remains that the questions *did* get before the

jury in spite of the Court's rulings and did prejudice the appellant in the mind of the jury. No rulings of the Court could raise from the jury's mind the repeated impressions conveyed by the improper questioning of the prosecution.

As a general proposition in criminal law, evidence of bad character is not admissible where evidence of good character has not been put in issue. It is to be noted in the instant case that there was not any evidence of good character offered by the appellant-defendant. The reason for this exclusion is that the defendant in a criminal case may be found guilty of a crime, not because he is believed to be guilty in connection therewith, but because the evidence of bad character may be thought by the jury to deserve punishment. Further, the accused's failure to produce testimony of his good character does not warrant the inference, if allowed, would render the above proposition meaningless and of no force. This doctrine has been set forth by Professor John H. Wigmore in his treatise on *Evidence,* Section 57 and is referred to by him as "Auxiliary Policy":

> "* * * Auxiliary Policy operates to exclude what is relevant—the policy of avoiding the uncontrollable and undue prejudice and possible unjust condemnation, which such evidence might induce * * *.
>
> * * * This doctrine is and can be supported as one better calculated than the opposite to lead to just verdicts. The deep tendency of human nature to punish, not because our victim is guilty this time but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of Court."

As a general proposition, this policy, then, operates to prohibit the prosecution from introducing evidence of *other criminal acts wholly apart from those with which he is charged.*

There are several state cases in point:

(1) In *Edwards v. State,* 239 SW Reporter (2d) 618 in a murder prosecution, there was evidence introduced concerning acts of *sexual intercourse* by the defendant with a prostitute. The Court held such questioning to be improper.

(2) In *People v. Geibel,* 208 Pac. Reporter (2) 743 in a prosecution for forgery, a question on cross-examination as to whether the defendant had been suspended from practicing law in the state was held to be prejudicial error.

(3) See also, *People v. McCarthy,* 200 Pac. Reporter (2) 69 where it was held that irrelevant evidence adduced by prosecution short of the crime and designed merely to degrade and prejudice defendant in the minds of the jury was held incompetent.

(4) Again, in *Acres v. Commonwealth,* 259 SW Reporter (2nd) 38, the Court on June 12, 1953 held, in a murder prosecution, that questions asked of the defendant about his association with women other than his wife were intended to smear the defendant's character and were incompetent and prejudicial.

It is immaterial whether the objections to the foregoing questions were properly sustained by the Court because once the improper questions are asked, it is almost impossible for the jury to ignore them.

In *Perroza v. Ortega,* 29 Ariz. 336, at pages 344-345, the offer of evidence which counsel must have known to be incompetent was held to be prejudicial, even though the jury was instructed to disregard it. The Court said:

> "We feel, however, that the evidence must necessarily have been prejudicial in the highest degree to the defendant, and it is a well-known fact that, when evidence is once admitted before a jury, it is almost impossible for them to disregard it."

In a similar case, *Blue Bar Taxicab v. Hudspeth,* 25 Ariz. 287, 296; 216 Pac Reporter 246, 149 the Court said:

> "The consequences of such information (that defendant was insured) is well known, and is sufficient to request a new trial. It is useless for counsel to talk of the innocuous character of this evidence, when they at the same time, in order to get the information before a jury, are willing to imperil any verdict which might be rendered. All lawyers know the rule in regard to such evidence, and they must not expect the Court to establish a rule, and then wink at its violation."

It is respectfully submitted, that on the basis of the foregoing objectionable questions the defendant should be granted a new trial.

ARGUMENT IN SUPPORT OF SPECIFICATION OF ERROR NO. III

The jury brought in conflicting verdicts based on what were substantially the same fact situations in Counts I and II of the indictment.

In spite of the overwhelming weight of authority to the effect that conflicting verdicts are allowed where there are two separate counts in an indictment, it is submitted that the fact situations in this indictment are out of basically similar fact situations. In Counts I and II the records were kept by the receptionists employed by the appellant; the same type of records were kept, consisting of an appointment book, a daily list of receipts, and a doctor's record card; the transcript shows that the doctor-appellant in each year following the same practices in his record keeping and filing of a return, with the exception that in 1947 a pseudo-bookkeeper assisted in the preparation of the return. It is submitted that it would be unreasonably torturing the appli-

cation of the law to the two sets of facts to arrive at a "Not Guilty" verdict on Count I and a "Guilty" verdict with a recommendation of lienency on Count II.

CONCLUSION

It is respectfully submitted that the judgment of the lower Court should be reversed.

WADE CHURCH,
324-327 Mayer-Heard Building
Phoenix, Arizona

Attorney for the Appellant